

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA T. JOHNSON,

Plaintiff-Appellant,

v

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. and SRP 2012-4, LLC,

Defendants-Appellees.

UNPUBLISHED

June 20, 2019

No. 343735

Oakland Circuit Court

LC No. 2017-162472-CH

Before: BECKERING, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants’ motion for summary disposition in this quiet title action following a mortgage foreclosure. We reverse and remand.

On October 11, 2006, plaintiff and her non-party ex-husband, Kevin Johnson, secured two mortgages from Mortgage Electronic Registration Systems, Inc. (MERS)—as nominee for the lender, Quicken Loans, and its successor and assigns—to purchase real property known as 23966 Copperwood Drive, Lyon Township, Michigan.¹ The first mortgage was in the amount of \$297,050 (recorded in Liber 38341, Page 397) and the second mortgage arose from a fixed-rate balloon note in the same amount of \$74,250 (recorded in Liber 38341, Page 416).

On September 1, 2008, plaintiff entered into a loan modification agreement with Faslo Solutions LLC, with regard to the second mortgage (recorded in Liber 40589, Page 704). The loan modification agreement defined and named Faslo Solutions as the “Lender” of funds in the amount of \$73,745.12, which was the amount payable under the note and mortgage, and stated that the borrower promised to pay “the Unpaid Principal Balance, plus interest, to the order of Lender,” i.e., Faslo Solutions.

¹ Because plaintiff is the only party to this action, we refer solely to her in this opinion.

On August 31, 2016, MERS assigned to SRP 2012-4, LLC, all interest it had with regard to plaintiff's second mortgage (recorded in Liber 49942, Page 663).

On February 16, 2017, a Notice of Foreclosure on the second mortgage was published in the Oakland County Legal News, and at some point plaintiff received a copy of the notice which had been attached to her premises. In part, the notice stated that plaintiff:

granted a mortgage to [MERS], solely as nominee for lender and lender's successors and assigns, Mortgagee, dated October 11, 2006, and recorded on November 3, 2006 in Liber 38341, on Page 416, and modified on September 1, 2008, recorded September 12, 2008, in Liber 40589, on Page 704, and assigned by said mortgagee to SRP 2012-4, LLC, as assigned, Oakland County Records, Michigan, on which mortgage there is claimed to be due at the date hereof the sum on One Hundred Seventy-Eight Thousand Twenty-Seven Dollars and Forty-Four Cents (\$178,027.44).

The Notice of Foreclosure continued that the mortgage would be foreclosed by a sale of the subject premises on March 21, 2017, which would be followed by a six-month redemption period. The sale was subsequently adjourned until July 18, 2017, at which time SRP 2012-4, LLC, purchased the property for \$88,000 under a sheriff's deed (recorded in Liber 50900, Page 608).

Proceeding *in propria persona*, on December 7, 2017, before the six-month redemption period expired, plaintiff filed this quiet title action. Plaintiff alleged that MERS had no beneficial interest in her property to assign to the foreclosing entity, SRP 2012-4, LLC, after she entered into the loan modification agreement with Faslo Solutions, which was not affiliated with MERS. Thus, SRP 2012-4 had no legal right to initiate foreclosure proceedings. Plaintiff attached to her complaint a copy of the loan modification agreement which defined Faslo Solutions as the "Lender" of funds in the amount of the unpaid balance on the second mortgage. The agreement also stated that plaintiff was to pay back that amount, plus interest, to Faslo Solutions. Plaintiff averred that her credit report from Equifax showed that her account with Faslo Solutions was "Paid and Closed" several years ago, on March 1, 2010, and she attached a copy of that credit report to her complaint. Accordingly, plaintiff alleged, SRP 2012-4 had no legal right to foreclose on her property, thus, the Sheriff's Deed was void ab initio and she was entitled to an order quieting title in her name.

On January 15, 2018, defendants moved for summary disposition under MCR 2.116(C)(8) and (10), averring that plaintiff defaulted on the modified loan agreement for the second mortgage which resulted in the properly-noticed foreclosure proceedings. Defendants argued that plaintiff's complaint must be dismissed for failure to plead a prima facie case to quiet title. Specifically, plaintiff merely challenged the assignment of the mortgage from MERS to SRP 2012-4, but plaintiff had no standing to challenge the assignment because she was not a party to the assignment. Further, plaintiff's claim that Faslo Solutions was the new "lender" was erroneous as evidenced by the fact that the original mortgage of record was never discharged and the loan modification agreement only modified the payment terms. Therefore, following the assignment, SRP 2012-4 had the same interest that MERS had in the subject property, which was a mortgage with payment terms modified by a subsequent agreement. Accordingly, SRP 2012-4

had the legal interest to pursue foreclosure proceedings and defendants were entitled to summary dismissal of plaintiff's complaint.

Plaintiff filed a response to defendants' motion, disagreeing with the claims in their entirety. Defendants replied to the response, arguing that plaintiff failed to provide evidentiary support for her position; her general denials were insufficient to overcome their motion for summary dismissal. Further, because the redemption period expired as of January 19, 2018, and plaintiff failed to exercise her right of redemption, she lost all interest in the property and had no standing to challenge the foreclosure by advertisement. Accordingly, plaintiff failed to state a claim upon which relief could be granted under MCR 2.116(C)(8), and failed to establish that a genuine issue of material fact existed under MCR 2.116(C)(10); thus, defendants were entitled to an order of summary dismissal.

Following oral arguments, the trial court issued its opinion and order granting defendants' motion for summary disposition under MCR 2.116(C)(8) and (10), holding that plaintiff failed to state a claim upon which relief could be granted and failed to allege any genuine issues of material fact. The trial court did not provide supporting rationale for its decision. Plaintiff subsequently filed a motion for reconsideration raising the same arguments, which the trial court denied. This appeal, filed by counsel on behalf of plaintiff, followed.

Plaintiff essentially contends—as she did in the trial court—that the foreclosure was void ab initio because MERS did not own or have any interest in the indebtedness secured by the second mortgage, and thus, had no such interest to assign to SRP 2012-4, the foreclosing entity.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants brought their motion for summary disposition under MCR 2.116(C)(8) and (C)(10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and, therefore, only the pleadings are considered to determine whether the nonmoving party failed to state a claim upon which relief can be granted. *Id.* at 119-120. Because the parties relied on documentary evidence and facts beyond the pleadings, we review the motion as granted under subrule (C)(10). See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). A motion brought under MCR 2.116(C)(10) “tests the factual support of a plaintiff's claim.” *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party must identify the matters that have no disputed factual issues, and must support its position with documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish by evidentiary materials that a genuine issue of disputed fact exists. *Id.* After considering the documentary evidence submitted in the light most favorable to the nonmoving party, the court determines whether a genuine issue of material fact exists to warrant a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Further, questions of law, including whether a party has authority to initiate foreclosure proceedings, are reviewed de novo. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001).

Foreclosure by advertisement is governed by MCL 600.3201 *et seq.* MCL 600.3204 provides, in relevant part:

1) A party may foreclose a mortgage by advertisement if all of the following circumstances exist:

(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.

* * *

(c) The mortgage containing the power of sale has been properly recorded.

(d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

* * *

(3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title must exist before the date of sale under [MCL 600.3216] evidencing the assignment of the mortgage to the party foreclosing the mortgage.

In this case, plaintiff argues that SRP 2012-4 was not the owner of the indebtedness or of an interest in the indebtedness secured by the second mortgage that MERS originally held and purportedly assigned to it because after she entered into a loan modification agreement with Faslo Solutions, Faslo became the owner of the indebtedness and that indebtedness was eventually paid off when she modified the first mortgage in April 2009. See MCL 600.3204(1)(d). Plaintiff notes that the holder of the first mortgage is CIT Bank, N.A., and the loan is serviced by LoanCare, LLC. As she offered in the trial court, plaintiff offers on appeal a copy of her credit report showing that her account with Faslo Solutions was “Paid and Closed” in March 2010. But for some unknown reason, the discharge of the second mortgage was apparently not recorded. In fact, plaintiff argues, as part of her bankruptcy case filed in May 2018, CIT Bank submitted its Proof of Claim as including both the first and the *second* mortgage, which is further evidence that the second mortgage was paid off when plaintiff modified the first mortgage. Thus, plaintiff claims, she has a superior title to the property at issue and was entitled to an order quieting title in her name.

Defendants argue on appeal that plaintiff did not raise the same arguments in the lower court and, thus, they should not be considered by this Court. While it is true that plaintiff’s claims in the lower court were difficult to discern as she proceeded *in propria persona*, plaintiff did consistently argue that neither MERS nor SRP 2012-4 were owners of the indebtedness or of an interest in the indebtedness secured by the second mortgage. See MCL 600.3204(1)(d). Plaintiff also consistently argued that she entered into a loan modification agreement with Faslo Solutions—who by its plain terms became her new “Lender” with regard to the second mortgage and, as shown on her credit report which she provided, that account had been “Paid and Closed” years ago. Thus, plaintiff consistently argued, albeit somewhat inarticulately, that SRP 2012-4 had no legal right to foreclose on the subject property because of a “default” on the second mortgage. See MCL 600.3204(1)(a). Defendants also mischaracterize plaintiff’s argument in

the trial court, stating that plaintiff had no standing to challenge the legal right of MERS to assign the mortgage to SRP 2012-4. But that is not what plaintiff argued; rather, she argued that MERS had no interest to assign to SRP 2012-4 because the indebtedness did not exist—it had been paid. MERS could not assign what it did not own.

As plaintiff argues on appeal, in granting defendants' motion for summary disposition the trial court failed to take into consideration the documentary evidence plaintiff submitted in support of her claim, including (1) the loan modification agreement she entered into with Faslo Solutions which clearly indicated that Faslo was the "Lender" of funds that paid off the second mortgage, and (2) her credit report which showed that her account with Faslo Solutions was "Paid and Closed" years before in March 2010. As plaintiff argues, this evidence considered in the light most favorable to her created a genuine issue of material fact on the issue whether SRP 2012-4 was the owner of the indebtedness or of an interest in the indebtedness secured by the second mortgage so as to be entitled under MCL 600.3204(1) to foreclose on the subject property. It is well-established that courts are "liberal in finding genuine issues of material fact" with regard to motions brought under MCR 2.116(C)(10). *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). Moreover, as plaintiff further argues, defendants filed their motion for summary disposition very shortly after plaintiff filed her complaint. Thus, this case was dismissed before any discovery could be conducted on the issue whether SRP 2012-4 was actually the owner of indebtedness related to the second mortgage—the very issue that plaintiff disputed. Generally, summary disposition is premature if granted before any discovery is conducted on a disputed issue of fact. See *Caron v Cranbrook Ed Community*, 298 Mich App 629, 645; 828 NW2d 99 (2012).

We are cognizant that, when the statutory requirements for mortgage foreclosure are met, a trial court generally lacks authority to set aside a foreclosure sale except in "a strong case of fraud or irregularity, or some peculiar exigency." *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007) (quotation marks and citations omitted). However, if plaintiff can establish her claim that SRP 2012-4 did not own an interest in her indebtedness that was secured by the second mortgage because Faslo Solutions had owned the interest and that debt was paid, a significant irregularity would exist to set aside the foreclosure sale.

In summary, the trial court erred in granting defendants' motion for summary disposition under the circumstances of this case. Therefore, we reverse the decision to grant defendants' motion and remand this matter to the trial court for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Amy Ronayne Krause